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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 766

FRANK E. CANTWELL,

Appellant,

vs.

CLOTILDA ALLEN CANTWELL,

Appellee.

APPEAL FROM THE SUPREME COURT OF INDIANA.

JURISDICTIONAL STATEMENT.

Certificate of Service Appended.

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Reference to the Official and Unofficial Reports of the Opinions Delivered in the Courts Below.

Three concurring opinions were rendered in the Supreme Court of Indiana, one by Landis, J., one by Arterburn, C. J., and one by Emmert, J. They are not yet officially reported but are reported in 143 N. E. 2d at pages 275, *et seq.*, and are reprinted as Appendices I, II and III, in this Statement in accordance with this Court's Rule 15.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOLVED.

The Nature of the Proceedings and the Statute Pursuant to Which It Is Brought.

Appellee, wife of appellant, has obtained by default, upon the substituted service hereafter discussed, a decree of the Circuit Court of LaPorte County, Indiana, awarding her a divorce from appellant, the exclusive custody of three minor children, $100,000 as alimony, an allowance of $400.00 per month for the support of the children and $12,000 in attorneys' fees (Appendix IV, pp. 17 to 23):

Prior to the rendition of the final decree, as appears from that decree, appellee obtained an order, likewise upon substituted service and notice, for the payment of $3,000 preliminary attorneys' fees (App. IV, p. 23).

The Supreme Court of Indiana has affirmed and has denied rehearing.

At the time of the institution of the suit and the service of process appellant had permanently quitted Indiana for residence in California. Service was effected by leaving a copy of the summons between the screen door and the front door of the house that appellant had left.

The suit was brought pursuant to Indiana's general divorce statutes (Burns 1946 Repl. Vol. 2, Part 2, Sec. 3-1205).

The case presents questions, formally stated hereafter, as to whether Indiana statutes hereafter cited and quoted, as considered and applied to appellant deprive him of due process of law by exerting Indiana's sovereignty over him after he had ceased to be a resident of Indiana and without requiring notice of suit otherwise than by leaving of process at an abandoned house.

The Indiana Supreme Court held *sua sponte* that appellant could not be heard to challenge Indiana's sovereignty or jurisdiction over him, his children or his property without asserting a meritorious defense to appellee's case. The case presents the further question whether this holding, which required appellant to succumb to the very jurisdiction that he sought to assail, denied him due process.

The Date of the Judgment Sought to Be Reviewed, the Time of Its Entry, the Date of Denial of Rehearing, the Date the Notice of Appeal Was Filed and the Court in Which It Was Filed.

The judgment of the Supreme Court of Indiana of which review is sought was rendered on June 17, 1957 (Appendix IV, R. Vol. II, p. 267).

Rehearing was denied on September 17, 1957 (R. Vol. II, p. 332).

The notice of appeal was filed on December 9, 1957, in the Supreme Court of Indiana (R. Vol. II, p. 335).

The Statutory Provision Conferring on This Court Jurisdiction of This Appeal.

This is an appeal from the highest court of Indiana "where is drawn in question the validity of" statutes of that State, cited and quoted hereafter, "on the grounds of" their "being repugnant to the Constitution of the United States" and "the decision is in favor of" the validity of such statutes, within the purview of Section 1257 of the Judicial Code (U. S. C. A., Title 28, Sec. 1257).

Cases Believed to Sustain the Jurisdiction of This Court.

The cases believed to support this Court's jurisdiction are:

Vanderbilt v. *Vanderbilt*, 354 U. S. 416.
May v. *Anderson*, 345 U. S. 528.
Estin v. *Estin*, 334 U. S. 541.
Armstrong v. *Armstrong*, 350 U. S. 568.
Halvey v. *Halvey*, 330 U. S. 610.
Griffin v. *Griffin*, 327 U. S. 220.

The Text and Citation of the Statutes Involved.

The validity of the following statutory provisions of the State of Indiana is involved:

The following statutory provision, which is applicable to service of process in civil cases generally:

> "The summons shall be served, either personally on the defendant, or by leaving a copy thereof at his usual place or last place of residence."
>
> (Burns Indiana Stats., Sec. 2-803, 1946 Replacement Vol. 2, Part 1, page 150-151).

The following provision, which is applicable specifically to suits for divorce:

> "The Clerk of the court in which petition is filed shall issue a summons for the defendant to appear and answer said petition, which summons shall be personally served on said defendant, *if a resident of the state*, either by reading or leaving a copy thereof at his or her usual place of residence, such usual place *to be the residence of the defendant at the time the copy is so left.*"
>
> (Burns Indiana Statutes, 1946 Replacement Vol. 2, Part 2, Sec. 3-1205, page 878).

Neither statute contains any provision requiring mailing, personal delivery or other attempt to communicate notice to the former inhabitant of an abandoned residence.

THE QUESTIONS PRESENTED BY THIS APPEAL.

A.

The challenged Indiana statutes, as construed and applied to appellant by the Supreme Court of Indiana, purport to validate an order for preliminary attorneys' fees and a decree awarding appellee a divorce, the custody of children and a personal money judgment upon service of process effected by leaving a copy of the summons at a home in Indiana that appellant had permanently quitted with two of the children for residence in California.

Do the challenged statutes so far purport to exert extra-territorial sovereignty over appellant's person, children and property as to deprive him of due process of law under the Fourteenth Amendment with respect to

(a) The provision divorcing the parties,

(b) The provision awarding appellee sole custody of the parties' children,

(c) The award of $400 per month child support money,

(d) The award of $100,000 in alimony

and

(e) The award of $12,000 in attorneys' fees?

B.

Do the challenged Indiana statutes, as construed and applied to appellant by the Supreme Court of Indiana, deprive him of due process of law under the Fourteenth Amendment because as so construed they require him to assert, litigate and establish a claim of defense to the merits of appellee's suit as a prerequisite to permitting him to assail Indiana's

territorial jurisdiction over his person, children and property and to attack the sufficiency of the notice required by the Indiana statute?

C.

Do the challenged Indiana statutes, which purport to authorize personal service upon appellant by the leaving of a copy of the summons at a house that he had permanently quitted for residence in California without requiring further effort to communicate to appellant the fact of the institution of the suit by personal delivery of papers, mail or otherwise, deny appellant due process of law in that they purport to confer upon the Indiana courts jurisdiction over appellant's person, children and property without requiring constitutionally sufficient notice?

STATEMENT OF THE CASE.

Most of the facts upon which appellant relies for reversal are reflected in one or the other of the three concurring opinions rendered in this case or in the recitals of the default decree of divorce.

The parties, husband and wife, are the parents of two minor sons and a daughter (R. Vol. I, p. 24). They separated, appellee going to the home of her parents in Illinois, appellant remaining in Indiana in the residence formerly occupied by the parties and their children (R. Vol. II, p. 269).

On June 2, 1953, appellant "left the family home in Michigan City, La Porte County, Indiana, with the two boys of appellant and motored to California. Appellant had packed his furniture and belongings the day before he left and most of such items were, by appellant's direction,

transported to California by truck." (*Opinion of Landis, J.*, App. I, p. 1, R. Vol. II. p. 269). Appellant has permanently quitted Indiana and resides in Calffornia. (App. I, p. 1, R. Vol. II, p. 269.)

After an attempt to visit appellee on June 3, 1953, the day following his departure from Indiana, to pick up two sons as per an agreement of the parties relating to a divided custody arrangement, on June 4, 1953, two days after appellant had permanently quitted Indiana, appellee instituted this suit for divorce, custody of the children, support, alimony and attorney's fees. (*Opinion of Landis, J.*, App. I, p. 1, R. Vol. II, p. 269.)

Summons was "allegedly served by the sheriff at appellant's last and usual place of residence on June 4th" when the sheriff "left the summons under the door on the screened-in porch" of the house formerly occupied and still owned by appellant. (*Opinion of Landis, J.*, App. I, p. 1, R. Vol. II, p. 270.)

This service derived its purported efficacy from either or both of the Indiana statutes prescribing the mode of service of process set forth in this Jurisdictional Statement, *ante*, the first of which, applicable to civil actions generally, authorizes service of summons "by leaving a copy thereof at his usual or last place of residence" (Sec. 2-803 Burns 1946, Repl. Vol. 2, Pt. 2), and the second of which, specifically applicable to suits for divorce, authorizes the leaving of a copy of summons at "the residence of the defendant at the time a copy is so left." (Sec. 3-1205 Burns 1946, Replacement Vol. 2, Pt. 2, p. 878.)

Appellant duly challenged the efficacy of this service by special appearance in the trial court and presented that challenge to the Supreme Court of Indiana, as is reflected in the opinion of *Landis, J.*, (App. I, p. 1, R. Vol. II, p. 267).

Appellant had actual intelligence of the filing of appellee's suit. It has been and is his steadfast position, however, that the constitutionality of a statute authorizing service of process depends upon the terms and construction of the statute itself and not upon whether the defendant has or does not have actual informal knowledge of institution of the proceedings in which service is sought to be effected under the statute.

The trial court, having heard evidence from which it appeared that, as is reflected in the opinion of Landis, J., (App. I, p. 1, R. Vol. II, p. 270), and as we have noted above, service was attempted to be effected by leaving process at the home that appellant had quitted for California and having heard much evidence as to the tenor of the family life and the separation of the parties, the substance of which evidence is not deemed materiai to the presentation of questions tendered by this appeal, denied the motion to vacate the decree. (R. Vol. I, p. 91.)

In the trial court appellant assailed the constitutionality of the above mentioned provisions of the statute purporting to authorize service by leaving a copy of the summons at the home that he had quitted for residence in California in language quoted in the margin:[1]

---

[1] "2 (a) The decision of the court is contrary to law in that the Indiana statutes providing for service of summons (Burns 3-1205, 2-803) as applied by the court to the defendant in this case deprives the defendant if '* * * liberty or property without due process of law' in violation of Amendment 14, Section 1 of the Constitution of the United States, and also denies defendant a 'remedy by due course of law' in violation of Article I, Section 12 of the Constitution of the State of Indiana.

"2 (b) The decision of the court is contrary to law in that its decision denying defendant's motion to set aside the judgment and sustaining the default decree in this cause, awarding a default money judgment against defendant, awarding a default divorce against defendant, and awarding default custody over defendant's absent children, deprives the defendant of '* * * liberty or property without due process of law' in violation of Amendment 14, Section 1 of the Constitution of the United States, and also denies defendant a 'remedy by due course of law' in violation of Article 1, Section 12 of the Constitution of the State of Indiana." (R. Vol. I, pp. 92-93.)

Motion for a new trial was denied. (R. Vol. I, p. 94.)

On appeal, appellant renewed his contention that the above cited Indiana statutes purporting to authorize service of summons by leaving a copy at the home that he had quitted for permanent residence in California in his brief (pp. 119-20).

The opinion of Landis, J., takes cognizance of appellant's Federal constitutional contentions in the following passage:

> "Appellant has made numerous contentions on this appeal based upon the various specifications of his motion to set aside judgment, the principal ones being as follows: The trial court had no jurisdiction over his person, as no personal service of summons was had upon him at his alleged last and usual place of residence in Indiana. The due process clause of the Fourteenth Amendment of the Federal Constitution and the due course of law clause of the Indiana Constitution (Art. I, Sec. 12), have been violated by the default decree entered by the trial court and the denial of his motion to set the judgment aside." (App. I, p. p. 1.)

But a majority of the court held *sua sponte*, the point not having been raised by appellee, that because appellant did not assert and offer to litigate the claim that he had a meritorious defense to appellee's suit, he was precluded from challenging the jurisdiction of the trial court over his person or property. (*Opinion of Landis, J.*, App. I, p. 1.)

The effect of this holding was to require appellant to submit to adjudication by Indiana the very questions of fact and law, going to the substantive merits of appellee's case, that he says Indiana has no jurisdiction to adjudicate at all, viz., the question of the merits of appellee's substantive claims.

Stated otherwise, the effect of this holding was to sustain in their application to appellant Indiana's challenged

jurisdictional statutes; for the holding imparted to those statutes such efficacy as to require appellant to return from California to Indiana, to bear the costly expense of and prevail upon litigation as to the merits of appellee's claim, with the risk that failure to prevail upon the merits would deprive him of his jurisdictional and constitutional objections to Indiana's sovereignty over him, and, in short, to succumb to the very jurisdiction that he sought to assail.

In the meantime the order for preliminary attorneys' fees and the decree disposed of the custody of appellant's children and stood as a lien upon and constructive seizure of his property.

Since the Indiana Supreme Court's holding that appellant must in effect surrender to the very jurisdiction that he sought to challenge as a prerequisite to challenging it was vouchsafed by that court *sua sponte* in the opinion of Landis, J., appellant's first opportunity to attack the court's holding came in appellant's petition for rehearing. He raised his Federal constitutional question in language quoted in the margin:[2]

---

[2] "A. The effect of the opinions in this case and of this Court's judgment of affirmance is to require non-resident defendants over whom Indiana does not have sovereignty or jurisdiction to submit their defenses to adjudication upon the merits to the jurisdiction that they assail. Such a requirement amounts to an assertion of extra-territorial sovereignty and denies due process of law.

"1. Neither appellant nor any of his minor children was subject to Indiana's sovereignty either at the time of the institution of the suit, at the time of the purported service of process, at the time of the pronouncement of the *ex parte* decree of divorce, at any intervening time or at any subsequent time. Therefore the entire proceedings and judgment are not only absolutely void but deny due process of law under the Fourteenth Amendment to the Constitution of the United States.

"2. Even if appellant was subject to Indiana's sovereignty and to the trial court's jurisdiction to the extent that that court might sunder the marriage relation existing between him and appellee, which assumption we deny, the judgment of divorce is at least void as to its award of a monetary judgment and the custody of the children.

"The invalidity is such as to infect the judgment with lack of due process at least as to such awards of the custody of the children and of money." (R. Vol. II, p. 291.)

The Supreme Court of Indiana denied rehearing. (R. Vol. II, p. 332.)

Arterburn, C. J., reached a similar result, casting his conclusions, however, in terms of "waiver and estoppel". He reasoned in substance that, since he found upon conflicting evidence that appellant had quitted Indiana in violation of an agreement between his and appellee's attorneys, he was estopped to challenge Indiana's sovereignty and jurisdiction over appellant, his children and his property.

Although appellant does not acquiesce in the Chief Justice's finding of facts, he realizes that, since it rested on conflicting evidence, he may not appropriately ask this Court to reweigh contradiction in the testimony of the attorneys.

GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

I.

The question whether Indiana may require appellant to assert and litigate a defense to the merits as a prerequisite to challenging Indiana's sovereignty and jurisdiction is substantial.

That a State court may not condition the right to assail a judgment for alimony for want of due process in the matter of service upon the existence of a meritorious defense was directly held in

Griffin v. Griffin, 127 U. S. 220.

In the *Griffin* case, an original New York decree of divorce and award of allowances, concededly rendered upon valid process and after general appearance and contest,

was made the basis of the rendition *ex parte* of a subsequent New York judgment for allegedly unpaid arrears of alimony without notice to the defendant former husband. The pronouncement of such an *ex parte* judgment was then countenanced by the laws of New York.

Suit was brought upon the *ex parte* judgment in the District of Columbia, of which jurisdiction the defendant had become a resident, where it was assailed for want of due process.

The district court and the Court of Appeals, taking cognizance of and sustaining the validity of the New York practice of rendering such judgments *ex parte* where there was originally valid process, took further cognizance of and sustained the validity of a New York doctrine that forbade the defendant to challenge the judgment for want of notice except upon the assertion of a meritorious defense.

This Court reversed.

This Court said at page 231:

> "To the extent that New York refuses, if it does refuse, to set aside the judgment of 1938 unless there be some affirmative showing that there was a meritorious substantive defense to its entry, there is an assertion of power in the court to enter a money judgment and issue execution upon it without notice."

Continuing its discussion and using language most pertinent to the instant case, this Court said:

> "Due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights. To the suggestion that under the presumed New York practice the power asserted by the judgment does not include the final adjudication of any of the defenses which petitioner might have had, and that notice is therefore not required, the answer must be that the judgment authorizes the immediate issuance of execution. We are

> unable to reconcile the direction that petitioner's property be seized on execution to satisfy an obligation for the first time found by the judgment to be 'due and unpaid' with the theory that the obligation is, for constitutional purposes, thus only tentatively adjudicated. There can be no doubt that a levy upon any property petitioner might have in New York would substantially, and in at least some instances, permanently affect his rights. We cannot say that this could be done without notice of the proceeding said to justify the levy. Even though petitioner could, if he knew of the judgment before execution is actually levied, move to set the judgment aside, that could not save the judgment from its due process infirmity, since it and the New York practice purport to authorize the levy of execution before petitioner is notified of the proceeding or the judgment."

The Court's language and the *rationale* that it embodies are incisively apposite in this case.

In this case, as in the *Griffin* case, appellant's right to challenge Indiana's jurisdiction is made conditional upon his assertion and demonstration that he has a defense to the substantive merits of appellee's case.

The Indiana decree is even now a lien upon appellant's property in that State, California and wherever else he may have property.

If Indiana's decision in this case stands as the law of the land, *any* decree awarding preliminary attorneys' fees, divorce, custody of children, personal money judgment or property settlement in *any* matrimonial cause, even if rendered by a State to whose sovereignty neither party was subject, is effective unless the defendant addresses the merits of the plaintiff's case as a prerequisite to questioning jurisdiction.

Moreover, pending the litigation of the defendant's attack upon the court's jurisdiction, the judgment, although *ex*

parte, will, unless stayed, fix the custody rights of the children during litigation and will authorize the seizure of the defendant's property. Even if stayed, the judgment will constitute a lien upon that property, conditioned upon the existence of a meritorious defense as well as upon objections to sovereignty and jurisdiction.

Indeed, if the reasoning of the Supreme Court of Indiana is correct, *any* judgment rendered by *any* court, although rendered with no jurisdiction or process, is effective as a lien and as authorizing the seizure of property unless the defendant not only demonstrates lack of jurisdiction but submits to adjudication the very question that he says the court had no power to decide.

The question whether the Supreme Court of Indiana denied appellant due process in conditioning his right to challenge Indiana's sovereignty and jurisdiction upon an assertion of a defense to the merits is a substantial question of Federal constitutional law and is directly addressed to the validity of the Indiana statutes under which service of process was had in this case.

II.

The question whether Indiana has attempted to assert extra-territorial sovereignty over appellant's marriage, children and property is substantial.

The following decisions of this Court attest the substantiality of the question whether Indiana has attempted to exert extra-territorial sovereignty over appellant's marriage and the post-marital rights of the parties.

Vanderbilt v. Vanderbilt, 354 U. S. 416.

In the *Vanderbilt* case, a husband had obtained without personal service a decree of divorce in Nevada, of which State he was found to be a *bona fide* resident.

Although the decree provided that the husband and wife were "freed and released from the bonds of matrimony and all the duties and obligations thereof," this Court held that in the absence of personal service upon the wife, the decree could not affect the parties' post-marital rights even though it was sufficient to sunder the marital relationship.

In the instant case the decree was pronounced without personal service after appellant had permanently quitted Indiana for residence in California.

Under the teaching of the *Vanderbilt* case, the question of Indiana's extra-territorial sovereignty over the parties, their children and property, particularly as to the adjudication of post-marital rights, is a substantial Federal question.

Estin v. Estin, 334 U. S. 551.

In the *Estin* case, a wife had recovered a judgment for support but not of divorce in New York, where she and her husband were and had long been domiciled at the time that the judgment had been entered. Subsequently the husband removed to Nevada and obtained upon constructive service only a decree of divorce from his wife, who continued to reside in New York. The wife filed suit in New York for unpaid arrears in support under the New York judgment.

A majority of the court held that although New York was bound to give full faith and credit to the Nevada decree insofar as it terminated the marriage, it was not bound to

respect the decree insofar as it was asserted as a bar to the continuance of the obligation of support, the majority reading the New York law as not intended to discriminate against divorces of sister States.

Mr. Justice Frankfurter would have remanded for clarification of the New York law and Mr. Justice Jackson was of the view that New York had discriminated against the Nevada divorce and therefore denied the full faith and credit.

All of the members of the Court, however, recognized that Nevada could not by an *ex parte* decree rendered upon constructive service terminate the post-marital obligations of the parties.

May v. Anderson, 345 U. S. 528.

In *May* v. *Anderson*, a wife had left the marital domicile in Wisconsin in violation of an agreement with her husband and had taken her children to Ohio when Wisconsin pronounced a decree of divorce in favor of the husband and awarded custody of the children to him. Service in the Wisconsin proceedings was had upon the wife only by delivery of papers to her in Ohio.

This Court held that Ohio need not give full faith and credit to the Wisconsin decree insofar as the right to the custody of the children was concerned.

The case sounds in terms of full faith and credit and not of due process. But if Wisconsin's decree was valid at all, even in that State, it would have been entitled to full faith and credit in Ohio. Mr. Justice Frankfurter, in concurring, observed in *Williams* v. *North Carolina*, 317 U. S. 287, "The duty of a state to respect the judgments of a sister state arises only where such judgments meet the tests of justice

and fair dealing that are embodied in the historic phrase, 'due process of law' ".

In the instant case, as in *May* v. *Anderson*, it is claimed that the defendant spouse left the State of matrimonial domicile in violation of an agreement not to disturb the *status quo*. In *May* v. *Anderson*, it was held that such an agreement, although admitted in that case, did not invest Wisconsin with jurisdiction over the children when they were residents of another State at the time of the Wisconsin decree.

Halvey v. Halvey, 330 U. S. 610.

In the *Halvey* case, the wife filed suit in Florida for divorce and the custody of a child of the parties. Service of process on Mr. Halvey was had by publication, he making no appearance in the action. The day before the Florida decree was granted, Mr. Halvey, without the knowledge or approval of his wife, took the child to New York. The next day the decree was entered by the Florida court granting Mrs. Halvey a divorce and "awarding her the permanent care, custody and control of the child."

In subsequent *habeas corpus* proceedings in New York brought by the wife to recover custody of the child, the wife asserted and the husband denied the validity of the Florida decree in so far as it awarded the custody of the child to the wife.

Since this Court held that under Florida law, the Florida court had retained jurisdiction to modify the award of custody upon any ground not presented to the Florida court and that the husband had presented no grounds for such modification to the Florida court, this Court found it unnecessary to reach either the question of due process or full faith and credit. But the following language of this Court

demonstrates its perception of the substantial and important question whether a court may award custody of a child at a time when neither the husband nor the child is a resident of the state upon constructive as distinguished from personal service, even though the husband was in the *Halvey* case a resident of the State at the time that service was had.

The Court said at pages 615-6:

> "The narrow ground on which we rest the decision makes it unnecessary for us to consider several other questions argued, *e. g., whether Florida at the time of the original decree had jurisdiction over the child, the father having removed him from the State after the proceedings started but before the decree was entered; whether in absence of personal service the Florida decree of custody had any binding effect on the husband;* whether the power of New York to modify the custody decree was greater than Florida's power; whether the State has jurisdiction over the child may, regardless of a custody decree rendered by another State, make such orders concerning custody as the welfare of the child from time to time requires. On all of these problems we reserve decision." (Emphasis supplied.)

This case presents two questions upon which an expression was explicitly reserved in the above quoted language from the *Halvey* case:

> *First*, "Whether Florida (Indiana) at the time of the original decree had jurisdiction over the child (in this case, children) the father having removed him (them) from the State after the proceedings started but before the decree was entered,"
>
> *and*
>
> *Second*, "Whether in the absence of the personal service the Florida (Indiana) decree of custody had any binding effect upon the husband."

Indeed, the *Halvey* case is prime authority for the substantiality of the questions in the instant case; for in the *Halvey* case, personal service was had upon the husband before he quitted the jurisdiction. Even so, this Court discerned a substantial Federal question as being raised by the absence of the husband and the child from Florida at the time of the pronouncement of the decree.

In the instant case, the husband had permanently quitted Indiana for California before the suit was started.

Armstrong v. Armstrong, 350 U. S. 568.

The *Armstrong* case, cited above, is pertinent in its demonstration that constitutional question not reached by a majority of the court in that case but squarely presented in this case is substantial.

In the *Armstrong* case, a husband obtained an *ex parte* decree of divorce in Florida upon substituted service. The decree provided, *inter alia*, that

"No award of alimony be made to the defendant."

A majority of the court read this provision as meaning merely that the Florida court declined to adjudicate the wife's right to alimony at all. Hence they did not reach the question whether, if the decree had denied alimony to the wife, it would have been entitled to full faith and credit in Ohio or would have been lacking in due process for want of personal service. Four members of the Court voted to affirm. Mr. Justice Frankfurter would have dismissed the petition for *certiorari* as improvidently granted. But Mr. Justice Black, who was joined by Chief Justice Douglas and Mr. Justice Clark, in dissenting, read the Florida decree undertaking to deny Mrs. Armstrong alimony upon the merits. The dissenting members of the Court therefore reached the merits of the question of due process.

Mr. Justice Black said at page 576:

> "We believe that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony to Mrs. Armstrong. *Our view is based on the absence of power in the Florida court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a non-resident of Florida, had not been personally served with process in that State, and had not appeared as a party.* It has been the constitutional rule in this country at least since *Pennoyer* v. *Neff*, 95 U. S. 714, decided in 1878, that non-residents cannot be subjected to personal judgments without such service or appearance. We held in *Estin* v. *Estin*, 334 U. S. 541, that an alimony judgment was this kind of 'personal judgment.' See also *Kreiger* v. *Kreiger*, 334 U. S. 555; *Barber* v. *Barber*, 21 How. 582, 588; *Barrett* v. *Failing*, 111 U. S. 523, 525." (Emphasis supplied.)

Demonstrative not only of the substantiality but of the frequent incidence and importance of the question as to the authority of one State (in this case Indiana) to award custody of children not domiciled within the State's confines or even if domiciled therein when children are physically absent from the State, particularly where, as in the instant case, no personal service was had upon the defendant, is a note in 9 A. L. R. 2d at page 434, entitled "Jurisdiction of Court to award custody of child domiciled in State but physically outside of it." It is not the office of a jurisdictional statement exhaustively to brief numerous decisions of lower courts in an area with respect to which access is sought to this Court's jurisdiction. Hence we forbear extended analysis of this annotation and of the authorities that it collates. Suffice it to say that, summing up the holdings and intimations of many cases, the statement is made at page 439:

> "There is little accord among the authorities as to the proper basis of jurisdiction to award custody of a mi-

nor child, and the cases dealing with this question are in considerable confusion."

A similar annotation appropriate subject to similar commentary, appears in 4 A. L. R. 2d at pages 10 through 96.

At page 88 appears the following summary of the holding of many cases cited:

"The general rule is that a divorce decree awarding custody has no extra-territorial effect beyond the boundaries of the state where it was rendered, and that when the domicil of a child is changed and it becomes a citizen of another state, such child is no longer subject to the control of the court of the first state which rendered the divorce decree."

III.

The question of the constitutionality of Indiana's statutes authorizing the service of process by leaving a copy of the summons at a vacant house without requiring other efforts, such as personal service or mailing, to communicate notice, is substantial.

The challenged Indiana statutes cited and quoted, *ante*, (Burns Indiana Stats. 1946, Repl. Vol. 2, Part 1, Sec. 2-803, and Sec. 3-1205), purported to authorize the mode of service employed by appellee in this case, namely, a leaving of a copy of the summons at an abandoned house that appellant had quitted for permanent residence in California. They do not require any further effort to communicate the fact of the institution of suit, such as personal service upon the defendant, even at a place outside the jurisdiction, mailing, reasonable effort to deliver papers at the new residence or actual whereabouts of the defendant or any other of the many modern means of the giving of notice.

A statute that does not require a reasonably feasible mode of probable communication of notice is unconstitutional under this Court's holding in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 309. In the *Mullane* case a New York statute purported to authorize New York trust companies to settle their trustees' accounts with numerous beneficiaries of "common trusts" in judicial proceedings upon notice by publication. A decree settling such accounts of procedure upon such notice was entered. "The only notice given beneficiaries of this specific application (for settlement of the accounts) was by publication in a local newspaper in strict compliance with the minimum requirements of New York banking laws, Sec. 100 (*c*) (12)."

The Court said at page 329:

> "However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.
>
> "In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less."

McDonald v. Mabee, 243 U. S. 90.

In the *McDonald* case, cited above, this Court, holding invalid service by publication where a defendant had left the State, said at page 92:

> "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."

The leading authority in Indiana practice has expressed doubt as to the Constitutionality of Indiana's statutory provision authorizing the service of process merely by leaving the same at a former residence.

In the late Dean Gavit's Indiana Pleading and Practice, Vol. 2, Sec. 213 (e) (3) at page 1520, the author, a distinguished scholar of Indiana's system of procedure, warns that Indiana's statute permitting the service of process at the *former* residence of the defendant is probably offensive to the Fourteenth Amendment and unconstitutional.

He says:

> "The statute indicates that the service of summons should be at *the then residence* of the defendant. In the light of the constitutional problem discussed later this would appear to be a necessary interpretation for the reason that *service of the domicil which was not the then residence of the defendant would likely be invalid* under the due process clause of the Fourteenth Amendment * * * The Indiana statute is somewhat unusual in that in terms it permits the leaving of a summons at the defendant's residence in the absence of the defendant or any member of his household. The Federal Rules of Civil Procedure follow the practice in most states and require that the summons be left with 'some person of suitable age and discretion then residing therein.'"

He also says:

> "It would also seem *very clear* that a defendant in this type of situation might avoid the judgment *in any event* for the reason that he has not been accorded due process of law. Cases decided by the United States Supreme Court insist that the service of process or notice shall be such as is reasonably calculated to bring home actual notice to the defendant and that it be the best means available for this purpose under the circumstances. *Thus there is serious question as to the constitutionality of the Indiana practice on this subject*

and clearly the rule should be amended to prohibit the leaving of a summons at the residence of the defendant in his absence or the absence of any member of his household, and one should not rely upon the service of process under this provision where the summons is not actually delivered to a member of the household of the defendant." (Emphasis supplied.)

Thus the leading authority on Indiana's practice recognizes the substantial Federal question of the constitutionality of the Indiana statutes authorizing the service or process by leaving a copy of the summons at the former home of the defendant with no requirement of further effort to notify him of the pendency of the action.

The fact that appellant had actual informal information of the suit against him can not validate the statutes relied upon by appellee for jurisdiction.

IV.

If jurisdiction of this appeal is not noted, the questions involved are of such moment as to elicit certiorari.

We have demonstrated that the Supreme Court of Indiana has given effect to and thereby sustained as constitutional Indiana statues authorizing the service of process upon a non-resident of Indiana for the purpose of awarding divorce, custody of children and property, the serving having been effected by the leaving of the process at the former residence of the defendant.

And we have shown that this holding presents substantial Federal questions of the validity of the Indiana statutes thus sustained.

But in any event, the holding of the Supreme Court of Indiana that the defendant must assert a defense to the merits as a prerequisite to challenging Indiana's extra-territorial sovereignty over his persons, children and property presents a substantial Federal question which, even if it

does not directly involve the constitutionality of the Indiana statutes, it is of such importance as to evoke *certiorari*.

The effect of this holding is, as we have shown, to permit any plaintiff to obtain a divorce in any State and to require the assertion of a defense to the merits before jurisdiction may be assailed.

In the meantime, as this Court points out in *Griffin* v. *Griffin*, 127 U. S. 220, the judgment stands as a lien upon and authorizes the seizure of the defendant's property. Moreover, in this case, the judgment awards the custody of children, a factor not present in the *Griffin* case.

Finally, the award of preliminary attorneys' fees was similarly effective as a lien upon and authorizing seizure of appellant's property pending appellant's attempt to contest the validity of the service upon him, such order having been entered upon only substituted service and notice. Again, *Griffin* v. *Griffin*, 127 U. S. 220, is in point and controlling.

In short, the Supreme Court of Indiana has sustained the efficacy of a judgment of an award of preliminary attorneys' fees, divorce, award of the custody of children and award of property upon service on a non-resident, the children being likewise absent from the jurisdiction at the time of the institution of the suit and of the judgment, by the leaving of a summons at the former home of the defendant with no further requirement of notice.

And Indiana has forbidden appellant to attack this decree without submitting to the very jurisdiction that he seeks to attack.

Such a holding should call for this Court's writ of *certiorari*.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, William C. Wines, one of the attorneys for appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the fourth day of February, 1958, I served copies of the foregoing Jurisdictional Statement on the appellee, as follows:

By mailing of five copies of said Jurisdictional Statement to

DANIEL F. KELLY,
JOHN F. BECKMAN, JR.,
ALFRED J. LINK,
708 Calumet Building,
Hammond, Indiana,

in duly addressed envelope, postage prepaid.

WILLIAM C. WINES,
One of Attorneys for Appellant

APPENDIX 1

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IN THE

SUPREME COURT OF INDIANA.

FRANK E. CANTWELL,
Appellant,
v.
CLOTILDA ALLEN CANTWELL,
Appellee.

No. 29,305

APPEAL FROM THE LA PORTE CIRCUIT COURT
HONORABLE JOHN J. DAVIE, JUDGE.

LANDIS, J.

Appellee brought suit and obtained a default judgment against appellant for a divorce, for alimony, attorney's fees, and custody of minor children of the parties.

Approximately twenty days after the default judgment was rendered, appellant entered a special appearance and filed verified motion to set aside the default judgment to

which appellee filed answer. After a hearing upon the matter, the lower court overruled appellant's motion to set aside judgment. No question has been raised as to the form of the judgment appealed from in this case.[1]

Appellant has made numerous contentions on this appeal based upon the various specifications of his motion to set aside judgment, the principal ones being as follows: The trial court had no jurisdiction over his person, as no personal service of summons was had upon him at his alleged last and usual place of residence in Indiana. The due process clause of the Fourteenth Amendment of the Federal Constitution, and the due course of law clause of the Indiana Constitution (Article 1, § 12) have been violated by the default decree entered against him by the trial court and the denial of his motion to set the judgment aside.

At the hearing on the motion to set aside judgment the following facts appeared: Appellee's suit for divorce against appellant was filed on June 4, 1953, and summons was served by leaving copy at the last and usual place of residence of appellant at Michigan City in La Porte County, Indiana. Appellant and appellee had previously lived at such residence as husband and wife, and appellee wife had, on January 27, 1953, temporarily separated from her husband and gone to stay with her parents in Chicago. Appellant husband on June 2, 1953, (two days before suit was filed and summons served), left the family home in Michigan City, La Porte County, Indiana, with the two boys of appellant and appellee, and motored to California. Appellant had packed his furniture and belongings the day before he left, and most of such items were, by appellant's direction, transported to California by truck. Appellee wife attempted to visit the house on June 3, the day following his departure, to pick up the two boys as per an agreement between the parties relating to a divided custody arrangement, but was unable to gain admittance as appellant had already left for California with the boys without her knowledge. Appellee wife then consulted with her attorney, and

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[1] The sufficiency of the court's ruling as a judgment is supported by the following cases:

Ayrshire Coal Co. v. *Thurman* (1928), 73 Ind. App. 578, 127 N. E. 810;

State ex rel. Jordan, Admrx., etc. v. *Marion Pr. Ct.* (1953), 232 Ind. 642, 114 N. E. 2d 770.

on Jun 4 filed a divorce action against appellant in La Porte County, Indiana, and on the same date a summons was purportedly served on appellant husband by leaving copy at his alleged last and usual place of residence in Michigan City, ~~La Porte~~ County, Indiana.

When the summons was allegedly served by the sheriff at appellant's last and usual place of residence on June 4, he could find no one at the residence, and he left the summons under the door on the screened-in porch. Appellee first actually entered the house, after appellant's departure, on June 7, and she found drapes at the windows and some personal effects and belongings of appellant in the house, including an overcoat, bathrobe, shirt, and some of his shoes. The furniture from upstairs was gone but there was some remaining in the basement. It also appeared that appellant was still the owner in his individual name of the residence estimated to be of the value of $35,000.00.

It further appeared that appellant shortly before leaving, stated to a neighbor: "It's no use. Since [my wife] is suing for divorce, I am going to California." (Tr. p. 216, lines 19 and 20.) He thereupon left by automobile for California, arriving there on June 21, 1953, which was 17 days after the service of process. It was not disputed that appellant had actual notice of the filing of the divorce action at least by July 25, 1953, and ten days thereafter on August 4, 1953, appellee, in default of appellant's appearance, was granted a divorce, alimony, attorney's fees and custody of the children of the marriage. Thereafter, on August 25, 1953, appellant entered special appearance and filed verified motion to set aside the default judgment to which appellee filed answer in reply.

It further appears from the record that after the divorce was granted appellee pursued appellant to California, and in court proceedings was awarded custody of the children by a California court; but, nevertheless, appellant, after such court hearing, again departed with the children for parts unknown. Appellant's present whereabouts are still unknown to his own attorneys of record, who state they have had no direct contact with him, but have only been in communication with him through an intermediary.

We believe the foregoing facts and the reasonable inference therefrom were strongly persuasive that appellant re-

mained a resident of La Porte County, Indiana, at the time of the service of process upon him,[2] but before it is necessary to consider such matter, we should determine whether appellant properly presented the question to the lower court so that the court's overruling of the same was error.

Appellee has contended that for numerous reasons it would be improper or inequitable in the case at bar to allow appellant to vacate the judgment in question. From an examination of appellant's motion to set aside judgment, it is apparent that nowhere in such motion is there an allegation that appellant has a good and meritorious defense to the cause of action upon which the judgment was based and which he seeks here to set aside. What is the materiality of this omission?

Appellant, in the case before us has not predicated his motion to set aside default upon the statutory remedy prescribing relief for default judgments taken through mistake, surprise or excusable neglect.[3] He concedes he has been appealing to the inherent and discretionary powers of the trial court to set aside a judgment which he alleges was taken against him without proper notice. Appellant has established no common law or statutory basis for relief, and his right to set aside the judgment must rest, if it is to prevail, upon equitable principles.

We recognize the unquestioned general weight of authority that a judgment-defendant who seeks to vacate a judgment on account of want of service of process, the record not showing any appearance to the action, must allege and prove that he has a meritorious defense to the cause of action on which the judgment was rendered. As stated in Freeman on Judgments, 5th Ed., Vol. 3, § 1189, at pp. 2468 and 2469:

> "* * * a preponderance of the decisions upon this subject declares that, notwithstanding an alleged want of service of process, a court of equity will not inter-

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[2] See; *Nelson et al.* v. *Haley* (1953), 232 Ind. 314, 111 N. E. 2d 812, 112 N. E. 2d 442, where this court held that evidence that a person two days before service of process was a resident of 4129 Cornelius Avenue, Indianapolis, Indiana, sufficiently supported the court's finding that on the date of service such address was said person's last and usual place of residence.

[3] Acts of 1941, ch. 72, § 1, p. 185, being Burns' Indiana Statutes § 2-1068, (1946 Replacement).

fere to set aside a judgment until it appears that the 'result will be other or different from that already reached', or, in other words, that there was a defense to the action, either entire or partial. The extraordinary powers of equity will not be used to take away legal advantage acquired under such circumstances in the enforcement of a just debt, in favor of one who does not deny that he owes the debt but merely seeks the right to defend against a claim to which he has no defense."

See:

Meyer v. *Wilson* (1906), 166 Ind. 651, 656, 76 N. E. 748;
Williams et al. v. *Hitzie et al.* (1882), 83 Ind. 303, 308, 309;
Woods v. *Brown, Guardian* (1884), 93 Ind. 164, 168, 47 Am. Rep. 369;
Schilling v. *Quinn* (1912), 178 Ind. 443, 447, 99 N. E. 740;
Fletcher v. *Barton* (1915), 58 Ind. App. 233, 236, 108 N. E. 137;
Garrison v. *Miller* (1916), 62 Ind. App. 485, 487, 488, 112 N. E. 22, 23 Cyc. 962.

For cases from other jurisdictions, see Note [1].

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[1] *Massachusetts Benefit Life Assn.* v. *Lohmiller* (1896), 74 Fed. 23, 20 C.C.A. 274;
Prudential Casualty Co. v. *Kerr* (1918), 202 Ala. 259, 80 So. 97;
Ingram v. *Alabama Power Co.* (1917), 201 Ala. 13, 75 So. 304;
McDonald v. *Cawhorn* (1907), 152 Ala. 357, 44 So. 395;
Dunklin v. *Wilson* (1879), 64 Ala. 162;
Secor & Brooks, et al. v. *Woodward* (1845), 8 Ala. 500;
Williams v. *Alexander* (1919), 140 Ark. 442, 215 S.W. 721;
Rotan v. *Springer* (1889), 50 Ark. 80, 12 S.W. 156;
State v. *Hill* (1887), 50 Ark. 458, 8 S. W. 401 (overruling *Ryan* v. *Boyd* (1878), 33 Ark. 778);
Hawley v. *State Assurance Co.* (1920), 182 Cal. 111, 187 Pac. 1;
Lee v. *Colquhoun* (1917), 175 Cal. 16, 164 Pac. 894;
Bell v. *Thompson* (1905), 147 Cal. 689, 82 Pac. 327;
Jeffery v. *Fitch* (1879), 46 Conn. 601;
Emerson v. *Gray* (1906), Del. Ch., 63 Atl. 768, (not officially reported in State report);
Bernhard v. *Idaho Bank & Trust Co.* (1912), 21 Idaho 598, Ann. Cas. 1913 E. 120, 123 Pac. 481;
Hier et al. v. *Kaufman et al.* (1890), 134 Ill. 215, 25 N. E. 517;
Colson v. *Leitch* (1884), 110 Ill. 504;

High on Injunctions (4th Ed.), Vol. 1, § 229 a, p. 24, states the rule as follows:

> "The more recent decisions * * * have set the question at rest, and it may now be stated as a rule, supported by the great weight of authority, that, even though the judgment be entirely void for want of proper service of process, relief will not be granted unless the complainant can show that he has a valid defense to the claim upon which the judgment was founded. The rule as thus announced is not only supported by the decided weight of authority but seems more in accord with the fundamental principles which govern courts of equity in granting equitable relief against the enforcement of judgments."

Black on Judgments, Vol. 1, (2d Ed.), § 376, p. 596, states:

> "It is generally held that where a judgment at law is void for want of jurisdiction, no summons or notice having been served on the defendant, nor opportunity given him for defense, nor any appearance entered by or for him, equity will relieve against the judgment, if

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Curran v. *Good* (1917), 204 Ill. App. 236;
Old Colony Life Ins. Co. v. *Graves* (1915), 200 Ill. App. 71;
Pierson v. *Linn* (1902), 101 Ill. App. 624;
Coon v. *Jones* (1859), 10 Iowa 131;
Tootie v. *Ellis* (1901), 63 Kan. 422, 88 Am. St. Rep. 246, 65 Pac. 675;
Newman v. *Taylor* (1892), 69 Miss. 670, 13 So. 831;
Harris v. *Gwin* (1848), 10 Smedes & M. (Miss.) 563;
Campbell Printing Press & Mfg. Co. v. *Marder* (1897), 50 Neb. 283, 61 Am. St. Rep. 573, 69 N. W. 774;
Wilson v. *Shipman* (1892), 34 Neb. 573, 33 Am. St. Rep. 860, 52 N. W. 576;
Batzer v. *Halliday* (1915), 31 N. D. 361, 153 N. W. 994;
Halverson v. *Bennett* (1911), 22 N. D. 67, 132 N. W. 434;
Gifford v. *Morrison* (1882), 37 Ohio St. 502, 41 Am. Rep. 537;
Pettis v. *Johnston* (1920), 78 Okl. 277, 190 Pac. 681;
Hockaday et al. v. *Jones* (1899), 8 Okl. 156, 46 Pac. 1054;
Miller v. *Shute* (1910), 58 Or. 603, 107 Pac. 467;
Crocker v. *Allen* (1891), 34 S. C. 452, 27 Am. St. Rep. 831, 13 S. E. 650;
Brown v. *Clippinger* (1923), 113 Tex. 364, 256 S. W. 254;
Masterson v. *Ashcom* (1881), 54 Tex. 324;
Preston v. *Kindrick* (1897), 94 Va. 760, 64 Am. St. Rep. 777, 27 S. E. 588;
Kremer v. *Sponholz* (1906), 129 Wis. 549, 109 N. W. 527;
John V. Farwell Co. v. *Hilbert and others* (1895), 91 Wis. 437, 30 L. R. A. 235, 65 N. W. 172.

it be shown that there is a meritorious defense to the action."

See also:

Pomeroy's Equity Jurisprudence, (5th Ed.), § 393 c, p. 83, as follows:

"On this fundamental principle of equity also, it is said, is based the rule that a meritorious defense must be shown if a party comes into a court of equity and seeks to set aside or enjoin a judgment regular on its face."

And § 1364, p. 985, as follows:

"In general, the party seeking the aid of equity to enjoin a judgment at law against him must not only show some ground for interference, within the doctrine of the text, but must also show that he has a good and sufficient defense to the cause of action, so that on a re-examination and retrial the result would be different."

See also:

American Annotated Cases, 1913 E, p. 124 as follows:

"It is a well-settled rule that where a judgment is regular on its face, one who moves to set it aside or enjoin its collection must set forth a meritorious defense to the original action."

This court has similarly held that under the surprise and excusable neglect statute, a motion or complaint to set aside a judgment will not be entertained, unless among other things, the party seeking to set aside the judgment alleges that he has a meritorious defense thereto.

Hoag v. *Jeffers* (1929), 201 Ind. 249, 159 N. E. 753;
Woodard v. *Killen* (1925), 196 Ind. 570, 148 N. E. 195;
Nash v. *Cars et al.* (1883), 92 Ind. 216;
Nord v. *Marty* (1877), 56 Ind. 531, 535;
Buck v. *Havens* (1872), 40 Ind. 221;
Hill and Another v. *Crump* (1865), 24 Ind. 291, 294;
Rooker v. *Bruce* (1908), 171 Ind. 86, 89, 85 N. E. 351.

The rule requiring a meritorious defense to be shown before a judgment will be set aside, in a proceeding such as the one before us, is a reasonable condition interposed by courts of equity.[5] This is not unreasonable to a defendant,[6] for under the authorities the only showing such defendant need make to invoke the aid of equity in this respect is to indicate he has a prima facie meritorious defense to the judgment he seeks to set aside.[7] This condition preliminary to equity's taking jurisdiction is premised upon the ground that equity will not interfere with a judgment recovered at law, unless such judgment is unjust or unconscionable.[8] There is a maxim that courts of equity will not do or require the doing of a vain or useless thing,[9] yet there is nothing more useless or vain than the setting aside of a judgment although no defense to it exists. Defendant's action to set aside the judgment without any claim of merit to his defense is accordingly only a moot proceeding as far as equity is concerned.[10] Equity is also desirous of preventing circuity of action,[11] and this purpose is served by equity's refusal to upset a judgment when the defendant-petitioner has set forth nothing to indicate that if the cause were tried again on the merits a different result would be reached. The in-

[5] 19 Am. Jur. "Equity," § 22.

A court of equity has power to make its granting of relief dependent upon the performance of conditions by a party litigant, if the conditions are such as are imposed in the exercise of a sound discretion, and of a character calculated to satisfy the dictates of conscience.

[6] See: 16A C. J. S., "Constitutional Law," § 712, p. 1222, "Reasonable conditions and restrictions governing the enforcement of rights do not abridge the constitutional guaranty insuring open courts and a remedy for injuries." See also: *Woolley* v. *Indiana Asphalt Par. Co.* (1918), 187 Ind. 575, 120 N. E. 597.

[7] See: 49 C. J. S., "Judgments," § 349, p. 704, "Although the party seeking relief must show at least presumptively that he has a defense, the requirement of a meritorious case does not necessitate an absolute guarantee of victory or a conclusive showing of sufficient cause of action or defense. It is enough to present facts from which it can be ascertained that the complaining party has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding; it suffices to establish good faith and to tender a seriously litigable issue."

[8] 49 C. J. S., "Judgments," § 349.

[9] *Hutcheson* v. *Hanson* (1951), 121 Ind. App. 546, 98 N. E. 2d 688; 30 C. J. S., "Equity," § 16.

[10] *Doss* v. *Yingling* (1937), 103 Ind. App. 555, 9 N. E. 2d 139.

[11] *Wiman* v. *First Christian Church of Mayfield* (1938), 273 Ky. 821, 117 S. W. 2d 989; *Young* v. *Weber* (1934), 117 N. J. Eq. 242, 175 Atl. 273.

disposition of courts of equity to set aside judgments for no reason was succinctly stated in

> *Meyer* v. *Wilson* (1906), *supra*, 166 Ind. 651, at page 658, 76 N. E. 748, at page 750:
>
> "* * * And if a party can say nothing against the justice of a judgment, can give no reason why in equity he ought not to pay it, a court of equity will not interfere, * * *."

As appellant's motion to set aside judgment was insufficient, in view of its failure to allege appellant had a good and meritorious defense to the cause of action upon which the judgment was based, it is accordingly our conclusion that the lower court's action in overruling the motion to set aside judgment was not error.

It is therefore unnecessary for us to consider upon this appeal the respective specifications in appellant's motion to set aside judgment as to the alleged invalidity of the default judgment rendered by the lower court.

It is similarly unnecessary to discuss appellant's further contention that the lower court committed error in denying appellant's petition for production and inspection of a letter, as appellant has conceded this is irrelevant if our opinion is not predicated on an estoppel.

The judgment of the lower court is affirmed.

BOBBITT, J., concurs.

ARTERBURN, C. J., concurs with opinion, in which ACHOR, J., concurs.

EMMERT, J., concurs with opinion.

APPENDIX II.

IN THE

SUPREME COURT OF INDIANA

FRANK L. CANTWELL,
Appellant,
v.
CLOTILDA A. CANTWELL,
Appellee.
No. 29,305

APPEAL FROM THE LA PORTE CIRCUIT COURT
HONORABLE JOHN J. DAVIE, JUDGE.

ARTERBURN, Chief Justice (Concurring Opinion).

I concur in the majority opinion; however, I think there is a more cogent reason for sustaining the decision of the trial court. To me, it appears that principles of waiver and estoppel are applicable here. A review of the evidence is helpful on this point.

The appellant and appellee were having marital difficulties in January, 1953, when the appellee went to her parents' home in Chicago, and consulted her attorney in Hammond, Indiana, Richard P. Tinkham. Her attorney got in touch with Albert E. Jenner, Jr., attorney at Chicago, and a mutual friend of both parties. He later became attorney for appellant. The two attorneys discussed the case from time to time, and submitted conditions and terms for settlement. Appellant's attorney, Albert E. Jenner, Jr., on March 14, 1953, in one of his letters, wrote appellee's attorney, in part:

> "I am assuming that, in the meantime, pending completion of Dr. Boshe's interviews, matters will remain in status quo. Maintenance of the status quo is imperative if anything is to be worked out. I wish you would write me confirming that fact because I have induced Mr. Cantwell to proceed on that premise and I will be personally very much embarrassed if you had

in mind proceeding otherwise and my not being advised thereof."

On March 23, 1953, Mr. Tinkham answered without specifically using the words "status quo", stating:

> "In general, I agree with everything you have said. It is my wish that Mr. and Mrs. Cantwell can find the basis for a reconciliation. * * * Consequently, I believe this situation, which I hope is temporary, should be continued until such time as a definite decision can be reached."

Attorney Jenner denies sharply there was any agreement to keep the status quo; however, Mr. Tinkham states emphatically there was such an agreement, and that it was reemphasized and discussed in various conversations between him and Mr. Jenner. Part of Mr. Tinkham's testimony is in substance as follows:

> "I recall a telephone conversation with Mr. Jenner in which the agreement that Mr. Cantwell would stay in the State of Indiana was discussed, and it seems to me that Mr. Jenner did say that he had persuaded Mr. Cantwell to give up the idea of going to California—that is a hazy recollection. There is no doubt in my mind about the agreement that Mr. Cantwell was to remain in Indiana. We agreed not to file the divorce pending determination of negotiations. That was part and parcel in my mind of the whole status under agreement. I heard Mr. Jenner say yesterday on the stand that there was no such agreement. One or the other is mistaken. One of us is wrong about it."

On May 11, 1953, Mr. Tinkham submitted a number of reconciliation conditions. On May 28 and June 1, 1953, Mr. Tinkham called appellant's attorney with reference to what Mr. Cantwell reactions were to these proposals. Mr. Jenner's answer was that he had discussed the terms with appellant's brother, an attorney in Chicago, and had no direct answer from appellant.

On June 1, 1953, the appellant, Frank Cantwell, arranged to have his furniture in the house shipped out to California in care of another person. Sometime around noon on June 2, 1953, the appellant left Michigan City, Indiana, by auto-

mobile taking his two sons with him, at that time ages 7 and 5. On June 3, 1953, the appellee arrived in Michigan City to get her two sons who were to visit with her, under a pending agreement with appellant. She found their home was abandoned, the furniture had been moved out, and that the appellant had left the day before. After the appellant left the State of Indiana, appellee, after considerable effort, located him in California, and instituted an action there to recover the custody of the two boys. Appellant appeared there, and contested the action but the California court awarded the custody of the two boys to Mrs. Cantwell. On the night before the appellant was to surrender the custody of the boys in California, he again fled the jurisdiction of the court.

Appellee filed her suit for divorce on the 4th day of June, 1953, and summons was served at appellant's last and usual place of residence in Michigan City, in the State of Indiana. Judgment was entered in her favor accordingly, and before the term of court ended, the appellant, through his attorney, appeared specially, and filed a motion to set aside the judgment on the ground that he had no residence in Indiana at the time the summons was issued and served. In the hearing on that motion, Mr. Tweedle, the appellant's attorney, stated in substance:

> "I do not know the present address of the defendant Frank Cantwell. The only address I ever had was one in Carmel, California. I have never personally discussed this case with the defendant. The address in California is the only one I ever had at any time; subsequently I communicated by letter with him through devious means. I have never discussed the case with him by telephone. My employment was by Mr. Albert Jenner, Jr."

He further said he had never discussed the case with Mr. Cantwell except to advise him by letter that Mr. Tinkham would consent to the setting aside of the judgment if Mr. Cantwell would authorize an appearance and defense on the merits.

We must accept the evidence most favorable to appellee in support of the finding and judgment of the trial court. The trial court has determined whom it will believe, and how the facts should be resolved. The appellant's attorneys have

improperly gone outside of the record, and stated that the trial court, in commenting upon its general finding, said it was making no decision upon the issue of estoppel, and have further challenged the appellant's attorneys to deny this statement. To say the least, this was not the way matters are presented to this court on appeal. We look only to the record. The record here shows the court overruled the appellant's demurrer to appellee's plea of estoppel or waiver, as the case may be. This was an issue in the hearing on the motion to set aside the judgment, and the court decided it was a good issue if proved. If the appellant desired a special finding he should have asked for it instead of attempting to present one in this manner, dehors the record.

The appellant is an attorney who retired from the practice of law in Chicago in 1947, and his brother, who acts as an intermediary at this time, is also an attorney. They undoubtedly know the significance of an agreement and the meaning of status quo, and the effect of waiver and an estoppel. The appellee had an opportunity to file suit first, and then to talk about a settlement *afterwards,* if she had desired. Ordinary precaution in view of appellant's previous talk of going to California would have dictated such a suit be filed unless she relied upon the representation of appellant and his attorneys that the status quo would not be changed.

The appellant attempts to avoid the effect of his agreement to maintain the status quo by a reference to the statute, Acts 1881 (Spec. Sess.), ch. 38, § 837, p. 240, being § 4-3609 Burns' 1946 Replacement:

> "An attorney has authority, until discharged or superseded by another:
>
> "First. To bind his client in an action or special proceeding by his agreement filed with the clerk entered upon the minutes of the court, and not otherwise."

The appellant states that this statute applies to agreements made after suit is filed, and impliedly prohibits agreements prior to the filing of a suit made by attorneys for their clients. We find no prohibition in the statute against attorneys, pending negotiations and prior to filing a suit, binding their clients, as an agent might bind his principal where they have authority, and are authorized to do so. An attor-

ney at least has the usual authority of an agent for his principal. It seems to us the statute referred to is applicable to cases where there is no expressed or implied authority from the client shown during a pending proceeding. It really extends the usual scope of authority of an agent where he is an attorney in a pending action. Since no action was pending the statute was not applicable to an agreement made by attorneys for their clients.

The appellant knew of the arrangements of his attorney to maintain the status quo. His attorney in writing Mr. Tinkham, said he had "induced Mr. Cantwell to proceed on that premise." It is undisputed that during negotiations the attorneys did enter into agreements which were accepted and acted upon by the parties. This included:

1. The custody of the two boys should be alternated at two week intervals between the parties pending negotiations.

2. The parties should remain temporarily separated.

3. That they should make a good faith attempt to settle their difficulties through their attorneys.

These agreements strengthen and support the conclusion that there was a necessary corollary agreement that the relationship of the parties should remain in the status quo which include not only their residence, but the status of the property which each owned.

The evidence shows appellant and his attorney had actual notice of the filing of the divorce suit prior to the entry of the judgment. His contention that he was not properly served with a summons, if true, is the result of his own violation of the status quo agreement.

There is no merit in appellant's contention that the trial court erred in refusing a request to have appellee produce a letter written by one of her co-counsel (Tinkham) to another of her co-counsel (Link). Regardless of the failure to allege or show she has possession of the letter, an order of production would have violated the confidences existing between attorney and client.

Acts 1881 (Spec. Sess.), ch. 38, § 275, p. 240, being § 2-1714 Burns' 1946 Replacement;

Acts 1937, ch. 88, § 1, p. 452, being § 4-3608 Burns' 1946 Replacement.

It is abhorent to one's sense of privacy to think that one party may pry into the confidences and private files of the attorney of the opposing party.

58 Am. Jur., Witnesses, § 462, p. 259.

The appellant in this case gave up his right and privilege to change his residence, and move from the State of Indiana pending negotiations, in consideration that the appellee would not file suit during that time, and thus obtain jurisdiction of the person of the appellant. This was a binding contract. Existing rights were given up by each party. There may be some who would urge that this is in truth a *waiver* by the appellant of his right to change his residence for a consideration. We are not inclined to quibble over the name given the principle involved, whether we call it "waiver" or "promissory estoppel". Waiver and estoppel in many cases overlap. Be that as it may, there are sufficient facts for the application of the doctrine of promissory estoppel here.

3 Pomeroy's Equity Jurisprudence (5th ed.) § 808b, p. 211;

31 C.J.S., Estoppel, § 61a, p. 242.

Principles of estoppel are founded upon justice and fair dealings. It prevents a party from denying the existence of a fact, and thus profiting by his own wrong, or from taking inconsistent positions in order to gain an advantage.

19 Am. Jur., Estoppel, § 39, p. 637;

Robertson v. *Smith et al.* (1891), 129 Ind. 422, 28 N. E. 857, 15 L.R.A. 273.

"To prevent fraud or injustice, however, a promise is sometimes made the basis of an estoppel if the promise has been made to induce action and has in fact done so, usually where abandonment of a right is involved."

31 C.J.S., Estoppel, § 80, p. 289;

Restatement, Contracts, § 90, Ind. Annotations thereto.

There is no reason why this court should reject the plea of estoppel or waiver made by the appellee, and direct her to

another remedy in contract where damages alone would not adequately grant the relief to which she would be entitled. There should be no circuity of actions in this case. The relief should be direct by waiver or estoppel in the suit affected by the breach of good faith.

The policy of the law has always been the encouragement of settlements, and the avoidance of litigation. In the pursuit of that objective this court should look with favor upon collateral agreements made in good faith pending negotiations to keep matters in status quo, and should condemn the breaches of such agreements in the manner and form exhibited by the evidence here.

The judgment of the trial court should be affirmed.

ACHOR, J., concurs.

APPENDIX III.

IN THE

SUPREME COURT OF INDIANA

FRANK E. CANTWELL,
Appellant,
v.
CLOTILDA ALLEN CANTWELL,
Appellee.
No. 29,305

APPEAL FROM THE LA PORTE CIRCUIT COURT

EMMERT, J. (Concurring Opinion)

It is quite apparent appellant's action to set aside the default judgment was not brought under § 2-1068, Burns' 1946 Replacement, for he does not base it upon "mistake, inadvertence, surprise, or excusable neglect, . . ." Nor do I believe it was a petition appealing to the equitable powers of the court. There was an adequate remedy at law.

Appellant's pleading is in substance and in fact a petition to vacate the judgment because of a mistake in the service of process at his residence, which mistake did not appear on the face of the record. A petition to vacate a judgment for a mistake of fact is in law a petition for the common law writ of error coram nobis. *Sanders* v. *State* (1882), 85 Ind. 318; *State ex rel. McManamon* v. *Blackford C. Ct.* (1951), 229 Ind. 3, 95 N. E. 2d 556. "A mistake in regard to the existence of a fact upon which jurisdiction to proceed depends and which defect does not appear on the face of the record is ground for a writ of error coram nobis. . . . The writ lies to obtain relief against a judgment taken without process or notice, or where there were defects in the process, or in the service of the process." 34 C.J. p. 396, § 610. See 49 C.J.S. p. 566, § 312; 31 Am. Jur. p. 323, § 802.

No motion for a new trial is contemplated in an action for writ of error coram nobis. *Fluty* v. *State* (1947), 224 Ind.

652, 71 N. E. 2d 565; *Lucas v. State* (1949), 227 Ind. 486, 86 N. E. 2d 682; *State ex rel. Blanton* v. *Smith* (1949), 229 Ind. 1, 86 N. E. 2d 84. The historical origin of the writ as well as Rule 2-40 compel this conclusion. The motion for a new trial presented nothing, and therefore did not extend the time for perfecting the appeal.

Assuming, without deciding, that the overruling of appellant's "motion" on February 4, 1955, constituted a finding and a judgment, no extension of time to file a transcript and assignment of errors was ever filed here until June 29, 1955. The time for perfecting the appeal had expired, and this court never acquired jurisdiction to entertain the appeal. "A failure to perfect an appeal from a final judgment within ninety days, or within time properly extended under Rule 2-2, fails to give this court jurisdiction of the appeal and it should be dismissed. *State Board of Tax Commissioners* v. *Stanley* (1952), 231 Ind. 338, 341, 108 N. E. 2d 624; *Stocker* v. *City of Hammond* (1938), 214 Ind. 628, 16 N. E. 2d 874; *Brady v. Garrison* (1912), 178 Ind. 459, 460, 99 N. E. 738; *Vail* v. *Page* (1911), 175 Ind. 126, 131, 93 N. E. 705." *Dawson* v. *Wright* (1955), 234 Ind. 626, 632, 129 N. E. 2d 796, 799.

The appeal should be dismissed.

APPENDIX IV.

IN THE

CIRCUIT COURT OF LA PORTE COUNTY

CLOTILDA ALLEN CANTWELL,
Plaintiff,

v.

FRANK E. CANTWELL,
Defendant.

Comes now the plaintiff in person and by her attorneys, Richard P. Tinkham of Tinkham Beckman & Kelly, Hammond, Indiana, and Alfred J. Link and Frederick H. Link of La Porte, Indiana, and shows to the court service of summons upon the defendant, Frank E. Cantwell, by the Sheriff of LaPorte County, Indiana, by leaving a true and correct copy at the last and usual place of residence of the defendant, Frank E. Cantwell, at Michigan City, in LaPorte County, Indiana, on the 4th day of June, 1953, returnable on the 22nd day of June, 1953, which summons and return of the Sheriff are in the following words and figures, to-wit: (here insert), which said summons, service and return the court holds to be sufficient and approves.

Plaintiff also shows to the court by affidavit of Richard P. Tinkham that the defendant, Frank E. Cantwell, is not in the military or naval service of the United States; the defendant not being present in person or by counsel, the court now orders said defendant to be called in open court, and coming not, herein wholly makes default. The court now orders the prosecuting attorney to appear on behalf of the State of Indiana according to law.

Thereupon Leon R. Kaminski, Deputy Prosecuting Attorney for the 32nd Judicial Circuit, enters his appearance herein on behalf of and in the name of the State of Indiana, and files answer in general denial, which answer is in the following words and figures, to-wit: (No answer filed of record)

Again comes the plaintiff in person and by her counsel, and again comes said Leon R. Kaminski, Deputy Prosecuting Attorney, and this cause having been duly set for trial, and reached in regular order, is now submitted to the court upon plaintiff's complaint, the default of the Defendant, and the answer of the Prosecuting Attorney filed to said complaint in the name of and on behalf of the State of Indiana, without the intervention of a jury, a jury being waived.

The court having heard the evidence and being duly advised and fully satisfied in the premises, now finds:

1. For the plaintiff and that all of the material allegations contained in her complaint are true;

2. That the defendant has actual knowledge of the pendency of this action in this court.

3. That plaintiff is entitled to a divorce from the defendant on the grounds set out in her complaint;

4. That on the 4th day of June, 1953, the plaintiff, Clotilda Allen Cantwell, and the defendant, Frank E. Cantwell, and the children of the parties hereto, were residents of and were domiciled ... the County of LaPorte and State of Indiana, and that the court has jurisdiction of the subject matter of this action, and the subject thereof, and of the parties to this action;

5. That for the purpose of attempting to avoid and attempting to prevent the service of process upon the defendant in this action, the defendant fled from the State of Indiana;

6. That the plaintiff is a fit and proper person to have the care, custody, control and education of the children of the parties hereto, namely, Frank E. Cantwell, Jr., who was born on March 14, 1948; Peter Allen Cantwell, who was born on February 9, 1950; and Clotilda Marie Cantwell, who was born on September 9, 1952, until the further order of this court, subject to defendant's right to visit said children at reasonable times; but that defendant shall not have the right to remove said children from the actual custody and control of the plaintiff at any time; and that the defendant is not a fit and proper person to have the care, custody, control and education of the children of the parties hereto;

7. That the plaintiff should be granted permission of the court to have the custody of the children in some other state than the State of Indiana, the plaintiff having appointed her attorneys, Richard P. Tinkham, or Alfred J. Link, or Frederick H. Link, or any one of them, as her agents for service of notice or other process concerning the custody of said children or any of them.

8. That the defendant, Frank E. Cantwell, is the owner of the following described improved real estate in the City of Michigan City, Indiana, to-wit:

Lot Number Nine (9) of Block Number Fifteen (15) in Duneland Beach in the Fractional Southwest Quarter, Section Twelve (12), Township Thirty-eight (38) North, Range Four (4) West.

Lot Number Ten (10) of Block Number Fifteen (15) in Duneland Beach in the fractional East Half of the Southwest Quarter, Section Twelve (12), Township Thirty-eight (38) North, Range Four (4) West.

Lot Number Twenty-eight (28) of Block Number Fifteen (15) in Duneland Beach in the Fractional East Half of the Southwest Quarter, Section Twelve (12), Township Thirty-eight (38) North, Range Four (4) West.

That said defendant is also the owner of certain real estate in the State of California and certain moneys, stocks, bonds and securities in the State of Illinois or elsewhere: that the defendant, Frank E. Cantwell, is worth approximately Three Hundred Fifty to Four Hundred Thousand Dollars ($350,000.00-$400,000.00); that said defendant has an annual income of approximately Fifteen to Nineteen Thousand Dollars ($15,000.00-$19,000.00);

9. That a reasonable sum for the support and maintenance of the minor children of the parties is the sum of Four Hundred Dollars ($400.00) per month, which the defendant should pay each month to the Clerk of this court, beginning August 19, 1953, and a similar sum on the 19th day of each month hereafter until further order of this court and that said payments are in addition to any payments heretofore ordered by this court to be made;

10. That a reasonable fee for plaintiff's attorneys is the sum of Nine Thousand Dollars ($9,000.00), which should be

paid instanter to the plaintiff for the use and benefit of the attorneys for plaintiff in order to enable her to prosecute her cause of action herein, and which sum shall be in addition to the preliminary fee of Three Thousand Dollars ($3,000.00) hereinbefore ordered to be paid by the defendant;

11. That plaintiff is entitled to recover alimony from the defendant in the sum of One Hundred Thousand Dollars ($100,000.00), without relief from valuation or appraisement laws; and,

12. That the plaintiff is entitled to judgment for costs.

It Is, Therefore, Considered, Ordered, Adjudged And Decreed By The Court:

1. That the bonds of matrimony existing between plaintiff, Clotilda Allen Cantwell, and defendant, Frank E. Cantwell, be and the same are hereby dissolved, and that plaintiff, Clotilda Allen Cantwell be, and she is, hereby granted an absolute divorce from the defendant, Frank E. Cantwell;

2. That the plaintiff, Clotilda Allen Cantwell, be, and she is hereby granted the exclusive custody, care, maintenance, control and education of the three minor children of the parties herein, Frank E. Cantwell, Jr., Peter Allen Cantwell, and Clotilda Marie Cantwell, until further order of this court; that the defendant, Frank E. Cantwell, be, and he is, hereby granted the privilege of visiting said children at any reasonable time, at such place as the plaintiff shall have the custody of said children, but shall not remove said children or any of them from said place;

3. That the plaintiff be, and she is, hereby granted permission to have the custody of said children in some state other than the State of Indiana, the plaintiff having appointed her attorneys, Richard P. Tinkham, Alfred J. Link or Frederick H. Link, as her agents for service of notice or other process concerning the custody of said children or any of them;

4. That the defendant be, and he is, hereby ordered to pay into the Clerk's Office of this court for the use and benefit of the minor children of the parties, the sum of Four Hundred Dollars ($400.00) per month, beginning on

the 19th day of August, 1953, and a similar sum on the 19th day of each month thereafter until further order of this court, for the custody, care, control, support, maintenance and education of the minor children of the parties which sum shall be in addition to the support money hereinbefore ordered to be paid by the defendant;

5. That the defendant be, and he is, hereby ordered to pay to the plaintiff instanter, for the use and benefit of plaintiff's attorneys in the action herein as fees, the sum of Nine Thousand Dollars ($9,000.00) in addition to the sum of Three Thousand Dollars ($3,000.00) hereinbefore ordered to be paid by the defendant;

6. That plaintiff, Clotilda Allen Cantwell, have and recover of and from the defendant, Frank E. Cantwell, the sum of One Hundred Thousand Dollars ($100,000.00) as alimony out of the property of the defendant wherever the same may be located, without relief from valuation and appraisement laws; and,

7. That the plaintiff, Clotilda Allen Cantwell, recover of and from the defendant, Frank E. Cantwell, her costs and charges herein laid out and expended, taxed at $49.40.

Entered at LaPorte, Indiana, this 4th day of August, 1953.

(Signed) *Isadore E. Levine*
Judge pro tem of the La Porte
Circuit Court.